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FILE COPY

No. 12

In the Supreme Court of the United States

October Term, 1940

FLORENCE GUGGENHEIM, PETITIONER

v.

ALMON G. RASQUIN, INDIVIDUALLY AND AS UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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CITATIONS

282318—41——1

tion for a writ of certiorari was filed on May 21, 1940, and granted on October 14, 1940. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Where single-premium policies of life insurance are irrevocably assigned simultaneously with issuance, is the value thereof for gift-tax purposes the cost to the donor or the cash-surrender value of the policies in the hands of the donees immediately after issuance?

STATUTES AND REGULATIONS INVOLVED

The applicable provisions of the statutes and regulations involved appear in the Appendix, *infra*, pp. 36–45.

STATEMENT

This suit was brought by petitioner against the Collector of Internal Revenue to recover gift taxes paid by her. Upon a motion for judgment on the pleadings (R. 174), the District Court, pursuant to Rule 12 (c) of the Rules of Civil Procedure, entered judgment in favor of petitioner (R. 182, 183–184). The facts disclosed by the pleadings may be summarized as follows:

The petitioner, at the end of December 1934, then 71 years of age, purchased nine single premium policies of insurance upon her own life, and simultaneously made irrevocable gifts thereof to

three of her children. The policies were in the aggregate face amount of $1,000,000, and petitioner paid an aggregate premium of $852,438.50 therefor (R. 6–14, 17, 23–173). The petitioner treated the policies as having a cash-surrender value of $717,344.81 at the time of gift, and filed a gift-tax return listing the policies upon the basis of their alleged cash-surrender value (R. 6–7).

The Commissioner of Internal Revenue determined that the "value" of the policies for gift-tax purposes was $852,438.50 rather than their cash-surrender value, and accordingly assessed a deficiency of $13,804.69 (R. 7). Petitioner paid the deficiency and brought this suit for refund.

The District Court's decision in granting petitioner's motion for judgment (R. 175–181) was reversed by the Circuit Court of Appeals (R. 194–198).

SUMMARY OF ARGUMENT

1. The statute provides in general terms that the tax shall be based on the "value" of the gift. However, the Commissioner is authorized to issue regulations to implement the statute, and under that authority the Treasury in 1936 issued regulations which precisely apply to this case. Under such regulations the value to be determined in this case is "the amount which the company would charge for a single premium contract of the same specified amount on the life of a person of the age of the insured." Article 19 (9), Treasury Regula-

tions 79 (1936 Ed.), Appendix, *infra,* p. 37. We submit that this is a reasonable method of determining the value and is a permissible interpretation of the statute.

The cash-surrender value is an artificial amount, generally designed to discourage surrender of policies, and is comparable to what might be realized at a forced sale. The Commissioner therefore correctly rejected cash-surrender value as the measure of the tax.

The question of "value" arises here in the interpretation of a statute which imposes a tax upon the passing of money or property *from* the donor, and in the circumstances it is particularly appropriate to construe the statute so as to reach the full amount which the taxpayer has donatively expended.

Moreover, the owner of a fully paid life insurance policy possesses not only the right to surrender it at any time for its cash surrender value, but has the right to retain the policy as an existing contract and to enjoy its investment feature, the right to receive the face amount of the policy upon the insured's death, and in some instances the right to optional modes of settlement. The intent of the gift tax statute is not met unless all these economic benefits are reflected in the total taxable value of the policy. The value of all the rights which together constitute the life insurance policy, should not be telescoped into the value of the single right

to receive a predetermined amount upon surrender.

2. The application of Article 19 (9) of Regulations 79 (1936 ed.) is not prevented by the prior edition of Regulations 79 which had been promulgated less than two and one-half years earlier in 1933. The new edition applies to all gifts made after June 6, 1932, the date of enactment of the Revenue Act of 1932 which imposes the tax in question. See Section 1108 (a) of the Revenue Act of 1926, as amended by Section 506 of the Revenue Act of 1934.

Moreover, the 1933 edition of the Regulations did not deal with gifts of single premium policies at all, and the 1936 edition for the first time prescribed the formula to be employed with respect to such policies. The 1933 Regulations, relied upon by petitioner, dealt only with annual premium and similar types of policies, and the Treasury never understood those regulations as spelling out the rule for such policies as are here involved. And when the Treasury became aware of the problem presented by such policies, it promptly issued the new regulations. But even if the formula in the old regulations is applied literally to such policies, the result will be the same as that reached under the later edition of the regulations. However, the circuitous computations necessitated in applying the old formula to this kind of policy confirms the argument that it was never designed to cover such single premium policies.

But, in any event, even if the 1933 Regulations originally did support petitioner's position, it was within the power of the Commissioner to replace them with the 1936 Regulations. Section 1108 (a) of the 1926 Act, as amended by Section 506 of the 1934 Act, makes it abundantly clear that the Commissioner and the Secretary of the Treasury have plenary power to determine whether and to what extent a new regulation will apply with or without retroactive effect. Those provisions are rich in legislative history which discloses the full extent of the discretion committed to the Treasury.

Helvering v. *Reynolds Tobacco Co.*, 306 U. S. 110, which denies the power of the Treasury to apply new regulations retroactively, is distinguishable in several respects, but in any event, for reasons set forth in detail hereinafter, we believe that it was incorrectly decided and respectfully submit that it should be overruled.

ARGUMENT

THE DONOR IS TAXABLE UPON THE FULL AMOUNT THAT SHE PAID FOR THE POLICIES GIVEN AWAY BY HER

A. ARTICLE 19 (9) OF REGULATIONS 79 (1936 ED.) COVERS THIS VERY CASE AND IS CONCLUSIVE

Late in December 1934 the taxpayer, then 71 years of age, purchased nine single-premium policies of insurance upon her own life. and at the same time made irrevocable gifts of those policies. The

policies were in the aggregate face amount of $1,000,000, and petitioner paid $852,438.50 therefor. The court below treated the policies as having a cash surrender value of $717,344.81 at the time of gift[1] (R. 195), but held that the gift tax was to be measured by the amount which the donor paid for the policies rather than their cash surrender value.

Section 506 of the Revenue Act of 1932 (Appendix, *infra*, p. 36) requires that if a gift is made in property, "the value thereof * * * shall be considered the amount of the gift." And the sole

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[1] However, the policies themselves are in the record and affirmatively show that no one of them had a cash surrender value until the expiration of one year. (R. 29, 47, 63, 79, 97, 115, 135, 149, and 163.) It is true that paragraphs V, VI, and VII of the bill of complaint (R. 6) allege that petitioner's gift tax return reported gifts of policies "having a * * * cash surrender value on the date of the gift of $------," and the Government admitted the allegations of those paragraphs (R. 17). But it should be observed that those allegations simply state what petitioner reported in her returns, and the Government's answer simply admits that such facts were reported by petitioner. The answer does not admit the truth of those facts. Whether the stipulation (R. 21) was intended to concede that the policies had a cash surrender value at the date of gift, or was intended simply to identify each individual policy with the amount petitioner treated as taxable and described as "cash surrender value," is at least conjectural.

For convenience, this brief will treat the policies as having a cash surrender value of $717,344.81 at the date of gift, although we believe that the policies themselves forbid any such assumption, and we do not concede that the policies had any cash surrender value on the date of gift.

question here presented is whether "the value" of the insurance policies is the amount paid therefor by the donor ($852,438.50) or the amount of the cash surrender value ($717,344.81).

1. At the threshold of the inquiry it appears that Article 19 (9) of Treasury Regulations 79 (1936 Ed.) in terms governs this very case. Article 19 is headed "Valuation of property" and subdivision (9) of that article provides:

> The value of a life insurance contract or of a contract for the payment of an annuity issued by a company regularly engaged in the selling of contracts of that character is established through the sale of the particular contract by the company, or through the sale by the company of comparable contracts.

And subdivision (9) contains an example which applies precisely to this case:

> *Example:* A donor owning a life insurance policy on which no further payments are to be made to the company (e. g., a single premium policy or paid-up policy) makes a gift of the contract. The value of the gift is the amount which the company would charge for a single premium contract of the same specified amount on the life of a person of the age of the insured.

These regulations were issued under Section 530 (Appendix, *infra,* p. 36), which authorizes the Commissioner and the Secretary of the Treasury to promulgate regulations to implement the statute.

Gifts of life-insurance policies made after June 6, 1932, are specifically stated to be subject to tax by Article 2 (5), and that article in turn makes reference to Article 19 (9) for the valuation of such policies.

In this situation the Court is not confronted with the broad question as to what is the correct formula for determining the "value * * * at the date of the gift" of single premium life-insurance policies. Rather, the question is simply whether the formula prescribed in Article 19 (9) is within the power of the Commissioner under the statute. It is certainly applicable to this case, and unless it was beyond the power of the Commissioner, it should have the same force as a formula specifically prescribed by Congress. See *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90, 102; *Simpson* v. *United States*, 252 U. S. 547, 549, 550.

2. Since the statute merely speaks in general terms about "value", it was appropriate for the Commissioner to construe it as he did, having due regard for "the nature and purpose of the statute" involved. Cf. *Ray Copper Co.* v. *United States*, 268 U. S. 373, 377. That the interpretation adopted by the Commissioner in Article 19 (9) was well within the area of discretion is, we submit, beyond serious question.

At the very outset it should be recognized that the word "value" is to be construed, not *in vacuo*, but in connection with a statute imposing a tax

upon gifts. It is a tax imposed upon the donor, and, like the cognate estate tax, is measured by the amount of money or property passing *from* the transferor. The amount which the donee could immediately realize upon the gift by what is essentially a forced sale, is hardly the criterion which best evidences the value of the property passing from the donor. In the circumstances, it would be strange, indeed, to learn that one who had donatively expended $852,438.50, had made a taxable gift of only $717,344.81.

The owner of a fully paid life-insurance policy, whether donor or donee, possesses not only the right to surrender it at any time for its cash surrender value, but he has the right to retain the policy as an existing contract and to enjoy its investment feature, the right to receive the face amount of the policy upon the insured's death, and in some instances the right to optional modes of settlement. The intent of the gift-tax statute is not met unless all these economic benefits are reflected in the total taxable value of the policy. The value of all the rights which together constitute the life-insurance policy should not be telescoped into the value of the single right to receive a predetermined amount upon surrender.

This Court has recognized that the surrender of a policy to an insurance company amounts to a forced liquidation. *Lucas* v. *Alexander,* 279 U. S. 573. The cash surrender value is fixed in advance by insurance companies and is designed to dis-

courage surrender of policies. See Vance, *Insurance,* 2d Ed. (1930), pp. 55, 56. It is at most only one element that might be taken into account in determining value. Some policies may not have any cash surrender value, or may have a cash surrender value only at the end of a specified period. See footnote 1, *supra.* Can it be said that such policies have no "value" and that a gift thereof is exempt from tax?

Moreover, the cash surrender value reflects only the net reserve. But it is well known that the cost of a policy in the open market is much more: the insurance company must include in the price (premium) not only an item to go into the life reserves, but it must add various loading charges such as agents' commissions, cost of operation, etc. All such items are constituent elements that go to make up the final premium—i. e., the price at which one may purchase a life insurance policy in the open market. The mere fact that the purchaser cannot resell the policy to the issuing company at the full price should not obscure the situation. Thus, the purchaser of an automobile probably cannot resell it to the dealer at the price paid by him, even though he has not yet taken delivery. For, in the sales price were probably included such charges as salesman's commissions, etc., on which the dealer would be out of pocket were he to return the entire purchase price to his customer. Yet it seems quite plain that the purchase price of such an automobile would probably

be its 'value' for the purpose of the gift tax statute.

The donor, after all, made gifts of insurance policies, not of cash in the amount of the surrender values. If a gift of cash for immediate use were intended, it would be incongruous indeed for the donor to dilute the gift by making it in the form of an insurance policy. Since petitioner deliberately elected not to make the gifts in cash, there is no sufficient reason why the taxing authorities should be limited to the artificial value of the present right to surrender and cancel the contracts. That was only one of the bundle of rights represented by the contract.

Insurance policies, particularly of the type involved herein, are property of a unique character and their value cannot be ascertained by the use of methods for valuing more conventional property. Where, as here, the property to be valued is not ordinarily the subject of barter and sale, this Court has recognized that "the criteria at hand for ascertaining market value, or what is called exchange value, are not commonly available," and that the value of the property must be determined "under these inescapable limitations." *Los Angeles Gas Co.* v. *R. R. Comm'n*, 289 U. S. 287, 305. Although it may be that insurance policies are frequently employed as collateral for loans, there is not, so far as we are aware, any market for *selling* insurance policies already issued. And the mere fact

that petitioner might have been able to sell the policies to a stranger at their cash surrender value certainly does not establish a value for these policies. Petitioner paid approximately $850,000 for the policies, and intended to make gifts that would ultimately produce $1,000,000. It was, of course, contemplated by petitioner that the insurance contracts would be kept alive and would serve the purpose for which they were purchased. This Court has pointed out that "an important element in the value" of property "is the use to which it may be put." *Susquehanna Co.* v. *Tax Comm.* (No. 1), 283 U. S. 291, 296.

No argument is needed to demonstrate that the insurance company would not have been able to sell such policies at all if the entire value of the contracts consisted merely of the right to cash them immediately for some $135,000 less than their cost. Petitioner obviously invested in and gave to her children contracts which had a value over and above the amounts for which they could be at once liquidated. They were worth the cost of duplicating them on the gift date. In this case that is precisely what petitioner paid for them, and we submit that the court below correctly ruled that the value of the policies was their cost. The same conclusion was reached in *Commissioner* v. *Powers* (C. C. A. 1st),[2] which is to be heard immediately following

[2] Decided July 16, 1940, not yet officially reported.

this case (*Madeleine D. Powers* v. *Commissioner*, No. 486, present Term).

This method of valuation finds support in cases dealing with valuation of policies in actions for conversion, for breach of contract to issue a paid-up policy, and in allowing claims against insolvent life insurance companies. *New York Life Ins. Co.* v. *Statham*, 93 U. S. 24; *Bass* v. *Annuity Association*, 96 Kan. 205; *Ebert* v. *Mutual Reserve Fund Life Assn.*, 81 Minn. 116; *People* v. *Security Life Ins. and Annuity Co.*, 78 N. Y. 114; *Toplitz* v. *Bauer*, 161 N. Y. 325; *Speer* v. *Phoenix Mutual Life Ins. Co.*, 36 Hun (N. Y.) 322; *Universal Life Ins. Co.* v. *Binford*, 76 Va. 103.

Accordingly, it is abundantly clear that the formula prescribed by Article 19 (9) is not only correct on principle but is entirely consistent with the statute. It is applicable to this case and should be controlling. *Only by declaring the regulation beyond the competence of the Commissioner can any other result be reached.* And we respectfully submit that not only was it well within the area of discretion accorded to the Commissioner but it is doubtful whether any other formula would be valid for such policies as are here involved.

B. THE APPLICATION OF ARTICLE 19 (9) OF REGULATIONS 79 (1936 ED.) IS NOT PREVENTED BY THE PRIOR EDITION OF REGULATIONS 79

The gift tax provisions of the revenue law were enacted in the Revenue Act of 1932, and although

some of the provisions have from time to time been amended or modified, the Revenue Act of 1932 continues to be the operative gift tax statute.[3] Unlike the income tax law, there has been no reenactment of the gift tax statute. The first regulations promulgated under the gift tax provisions of the 1932 Act appeared on October 30, 1933, and were designated Regulations 79. Less than two and one-half years later, a second edition of Regulations 79 was issued on February 26, 1936.

The provisions relied upon by the Government in the foregoing part of this brief are found in the 1936 edition. The 1933 edition contained no provisions comparable to those upon which we rely in Article 19 (9) of the 1936 edition. However, it is perfectly plain that the 1936 edition was intended to supersede the 1933 edition and was intended to be applicable to all gift tax matters under the 1932 Act. See p. 9, *supra*. And if any doubt existed at all as to the applicability of the 1936 edition, that doubt is completely dispelled by Section 506 of the Revenue Act of 1934 (c. 277, 48 Stat. 680) which amended Section 1108 (a) of the Revenue Act of 1926 in the following terms:

> SEC. 506. RETROACTIVITY OF REGULATIONS, RULINGS, ETC.

[3] The only other gift tax statute ever enacted by Congress was contained in the Revenue Act of 1924 (c. 234, 43 Stat. 253), but was abandoned less than two years later in the Revenue Act of 1926 (c. 27, 44 Stat. 9). See Secs. 319–324 of the 1924 Act and Sec. 324 of the 1926 Act.

> Section 1108 (a) of the Revenue Act of 1926, as amended, is amended to read as follows:
>
> "(a) The Secretary, or the Commissioner with the approval of the Secretary, may prescribe *the extent, if any,* to which any ruling, regulation, or Treasury Decision, relating to the internal revenue laws, shall be applied without retroactive effect." [Italics supplied.]

Thus, these provisions make it clear beyond question that the new regulations are to have universal application, both prospective and retrospective, *unless* the Secretary of the Treasury or the Commissioner has prescribed that they may operate without retroactive effect. But neither the Secretary nor the Commissioner has so prescribed with respect to these provisions, and we do not understand petitioner to contend the contrary.

Accordingly, unless the new provisions should for some reason be invalid they are applicable to and control the outcome of this case.

Petitioner's argument seems to be that the 1933 edition required a result contrary to that in the later edition, and that the Commissioner was powerless to amend the 1933 edition so as to affect her liability for gifts made a year and several months prior to the amendment.

Our position is twofold. We contend, first, that the 1933 edition never dealt with this type of gift at all, and second, that even if such gifts had been

specifically covered by the 1933 edition, it was fully within the competence of the Commissioner to promulgate new regulations having universal application which were to supersede existing regulations.[4]

First. The 1933 regulations did not deal with gifts of single premium or paid-up policies of life insurance. The only provisions in Regulations 79 (1933 ed.) relied upon by petitioner are found in Article 2 (5) which provides:

> The irrevocable assignment of a life insurance policy, or the naming of the beneficiary of a policy without retaining any of the legal incidents of ownership therein, constitutes a gift in the amount of the net cash surrender value, if any, plus the prepaid insurance adjusted to the date of the gift.

[4] Of the six circuit courts of appeals which have considered this question two have decided it in favor of the Government, namely the court below in the instant case, and the First Circuit in the *Powers* case, No. 486, to be argued consecutively with the instant case. The four decisions to the contrary are: *Commissioner* v. *Haines*, 104 F. (2d) 854 (C. C. A. 3d); *Helvering* v. *Cronin*, 106 F. (2d) 907 (C. C. A. 8th); *Helvering* v. *Bryan*, 109 F. (2d) 430 (C. C. A. 4th); and *United States* v. *Ryerson*, 114 F. (2d) 150 (C. C. A. 7th), now pending before this Court, No. 494, and to be argued immediately following the *Powers* case, No. 486.

The *Haines* decision treated the 1933 edition as being applicable rather than the 1936 edition. The opinion stated that what it regarded as the pertinent language in the 1933 edition "remained the same in the 1934 and 1935 editions of Treasury Regulations 79." But the court erred in so stating, for there were no editions of Regulations 79 issued in

As the court below recognized (R. 197), those provisions were not designed to meet such a situation as is here presented. The very fact that they specify the amount of the gift to be the *sum* of the net cash surrender value and the prepaid insurance adjusted to the date of gift discloses the scope which the Commissioner intended those provisions to have.

A typical case for the application of those provisions would be the gift of an annual premium policy on which, say 7 premiums had been paid, and where the gift had been made three months after payment of the seventh premium. Applying those provisions, the amount of the gift would be the cash surrender value of the policy plus nine-twelfths of the prepaid insurance obtained by pay-

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1934 or 1935. The only editions are the 1933 and 1936 editions. Moreover, the court also declared that in "reenacting" the applicable statutory provisions in 1934 and 1935, "Congress must be taken to have approved the administrative construction." P. 855. But here again, the court was in error, because there was no reenactment of the provisions mentioned by the court in 1934 or 1935 or at any other time. Cf. *Helvering* v. *Hallock*, 309 U. S. 106, 120 n. Accordingly, this case can be distinguished from *Helvering* v. *Reynolds Tobacco Co.*, 306 U. S. 110, upon which the *Haines* opinion relied, for there is no room for the contention here that the early regulations by reason of their long standing in the face of repeated reenactments of the statute had become so imbedded in the statute as to prevent any retroactive change.

The decisions in the other three cases were predicated primarily upon the reasoning of the *Haines* decision, and are therefore equally unreliable.

ment of the seventh premium—i. e., that portion of the prepaid insurance that the donee will enjoy over the remaining nine months.

But those provisions had no application whatever to single premium policies. Indeed, when the 1936 edition was issued, the substance of those provisions was carried over with respect to annual premium policies. Thus, Article 19 (9) of Regulations 79 (1936 ed.) provides:

> * * * when the gift is of a contract which has been in force for some time and on which further premium payments are to be made, the value may be approximated, unless because of the unusual nature of the contract such approximation is not reasonably close to the full value, by adding to the interpolated terminal reserve at the date of the gift the proportionate part of the gross premium last paid before the date of the gift which covers the period extending beyond that date.

And since the reserve is approximately equal to the cash surrender value (together with a surrender charge), it is not unfair to state that these provisions roughly accomplish the same result as would be reached by applying the provisions of Article 2 (5) of the earlier regulations.

But the provisions of Article 2 (5) of the early regulations were never designed nor did the Treasury ever consider them as being applicable to a case such as is here presented. And when the

Treasury became aware of the fact that those provisions might be misconstrued to apply to such a case, it promptly changed those provisions in the new edition of Regulations 79, promulgated less than two and one-half years after the earlier edition had appeared.

Indeed, if one were to attempt to apply the provisions of Article 2 (5) of the 1933 edition literally to a single-premium policy given away at the time of purchase, one would reach the result that the single premium is the amount of the gift rather than the cash surrender value. And the circuitous computations that would be necessitated by such an application shows, we submit, that those provisions could not have been intended to govern such a situation.

The 1933 edition of Regulations 79 dealt only with transactions occurring after the date of the enactment of the gift tax statute on June 6, 1932. See Article 2 (Appendix, *infra*, p. 39). For a complete understanding of the regulations it must be recalled that after the repeal of the Revenue Act of 1924 there was no gift tax in effect until the enactment of the Revenue Act of 1932. Hence it was realized that various transactions which would constitute taxable gifts under the new statute might occur in connection with existing insurance policies. Accordingly, the regulations took note of the situation and specified three such transactions: (1) the irrevocable assignment of a policy; (2) the

naming of a beneficiary without retaining any of the legal incidents of ownership; and (3) the payment of premiums by an insured who has none of the legal incidents of ownership in the policy, and where the beneficiary is other than the donor's estate.

The first two of these transactions are dealt with in Article 2 (5) and the third transaction is dealt with in Article 2 (6). Similar transactions could also occur with respect to policies taken out after June 6, 1932, and the regulations were quite adequate to deal with any one of the three transactions where it occurred separately. However, the Treasury at the time of these regulations had had no experience with gifts of single-premium insurance policies simultaneously with their issuance and the regulations accordingly did not attempt to provide specially for such a combination of transactions. Nevertheless, if Articles 2 (5) and 2 (6) are applied literally to the gifts here involved, the result will be that the cost of the policies will be the measure of the tax.

Article 2 (5) alone provides that the irrevocable assignment of a life-insurance policy constitutes a gift in the amount of the cash-surrender value, plus the prepaid insurance adjusted to the date of the gift. This article assumes a payment of premium in advance of the gift. No gift tax would be incurred merely by taking out a policy and paying the premium, but if a taxable transaction occurs

later within the period for which the premium has already been paid, the regulation requires that an adjustment of the premium shall be made. The adjustment is obviously for the purpose of determining the portion of the paid premium which is properly applicable to the period beginning with the date of the gift and ending with the date to which the premiums already have been paid. For example, if a six months' premium had been paid on May 6, 1932 (one month before the enactment of the statute), and the policy were irrevocably assigned on July 6, 1932 (one month after the enactment of the statute), two-sixths of the premium would be allocable to the period prior to the gift and four-sixths of the premium would be allocable to the period from the date of the gift (July 6, 1932) to the expiration of the six months' premium period (November 6, 1932).

If an additional six months' premium should be paid by the donor on November 6, 1932, such payment would constitute an additional gift and be covered by Article 2 (6) of the Regulations.

The facts in this case disclose both an irrevocable assignment covered by Article 2 (5) and a payment of premiums covered by Article 2 (6). However, the combined application of Article 2 (5) and Article 2 (6) to the combination of taxable transactions exhibited by the facts of this case would not mean that the valuation is to be the sum of the cash-surrender value and the premiums.

The regulations have been interpreted to exclude the portion of the cash-surrender value which is credited to the policy by reason of the very premium which is included in the calculation. G. C. M. 13147, XIII-1 Cumulative Bulletin 358 (1934), Appendix, *infra*, pp. 40–45. It will be noted that this ruling, like Article 2 (5), assumes the premium payment at a different time from the gift, but the method of avoiding duplication by eliminating the cash-surrender value created by the premium payment is equally applicable here. Since the full premium was paid in advance in the case at bar, the entire cash-surrender value was created by the premium payment (*United States* v. *Ryerson*, *supra*), and the cash-surender value would therefore be entirely eliminated. As thus interpreted, the application of both Article 2 (5) and Article 2 (6) to the facts of this case would require the following computation: add together the cash-surrender value and the premium payment and then deduct the entire cash-surrender value. This leaves, as the value upon which the tax is to be computed, only the amount of the premium paid.

A similar result would be reached by a literal application of Article 2 (5) alone, without resorting to Article 2 (6) at all. Prepaid insurance is defined in G. C. M. 13147 as the premium paid prior to the date of the gift to obtain insurance coverage for a period subsequent to the gift. Although the case was tried on the assumption that the

policies were issued and assigned simultaneously (R. 13, 18, 194), the premium payment necessarily was made before the policies were in force and the issuance of the policies must have preceded the assignment as a matter of fact, even though the interval was short. In this situation it is perhaps strictly accurate to say that the entire amount of the premium constituted prepaid insurance and that no adjustment is necessary because the interval between the issuance of the policies and the assignment was inconsequential. Upon this view the computation under Article 2 (5) would be as follows: add cash surrender value and prepaid premium; deduct all of the cash surrender value because it was all created by the single premium payment and no adjustment of the premium payment has been made. The result is a value equal to the whole amount of the single premium.

The circuity attendant upon the application of the foregoing provisions of the 1933 Regulations to single premium policies makes it evident that they were drafted with only ordinary insurance in mind and were never intended to apply to policies like those involved herein. The only provisions in the 1933 Regulations applicable to the situation presented by the case at bar are the general provisions of Article 19 (1), Appendix, *infra*, p. 40, which provide:

> Art. 19. Valuation of property.—(1) *General.*—The statute provides that if the gift is made in property, the value thereof

> at the date of the gift shall be considered the amount of the gift. The value of property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell. Where the property is sold within a reasonable period after the date of the gift, and it is shown that the selling price reflects the fair market value thereof as of the date of the gift, the selling price will be accepted as the amount of the gift. All relevant facts and elements of value should be considered in every case.

But those provisions were too general and did not furnish a precise enough guide for the type of gift here presented. Indeed, if they were applied, the considerations discussed, *supra,* pp. 9–15, would require that the value of the policy be treated as the price that one would have to pay an insurance company therefor in the open market. And, at the very most, the 1936 Regulations merely crystallized into a specific rule the result that would be obtained in any event under the general provisions of Article 19 (1) of the 1933 Regulations.

Second. Even if the 1933 regulations originally did support petitioner's position, it was within the power of the Commissioner to replace them with the 1936 regulations. We have endeavored to show in the foregoing discussion that Article 2 (5) of the 1933 Regulations, relied upon by petitioner, was not intended to deal with gifts of single premium

policies, and that Article 19 (9) of the 1936 Regulations for the first time prescribed the formula to be applied. But if we should be in error in that position, then we respectfully submit that the Commissioner had full authority to issue the new regulations as applied to this case.

The plenary power to prescribe the extent to which any ruling, regulation, or Treasury decision may operate with [5] or without retroactive effect is plainly recognized by Section 1108 (a) of the Revenue Act of 1926, as amended by Section 506 of the Revenue Act of 1934, quoted, *supra*, p. 16. Those provisions are rich in legislative history.

The first comparable statutory provisions appeared in the Revenue Act of 1921, c. 136, 42 Stat. 227. Section 1314 of that Act provided:

RETROACTIVE REGULATIONS

> SEC. 1314. That in case a regulation or Treasury decision relating to the internal-revenue laws made by the Commissioner or the Secretary, or by the Commissioner with the approval of the Secretary, is reversed by a subsequent regulation or Treasury decision, and such reversal is not immediately occasioned or required by a decision of a court of competent jurisdiction, such subsequent regulation or Treasury decision may,

[5] For decisions involving retroactive application of regulations, see *Morrissey* v. *Commissioner*, 296 U. S. 344, 355; *Murphy Oil Co.* v. *Burnet*, 287 U. S. 299; *Manhattan Co.* v. *Commissioner*, 297 U. S. 129.

> in the discretion of the Commissioner, with the approval of the Secretary, be applied without retroactive effect.

In commenting upon those provisions (referred to as Sec. 1002 in the House bill), the House Ways and Means Committee stated (H. Rep. No. 350, 67th Cong., 1st Sess., p. 15):

> Section 1002 would permit the Treasury Department to apply without retroactive effect a new regulation or Treasury decision reversing a prior regulation or Treasury decision, unless such reversal is occasioned or required by a decision of a court of competent jurisdiction.

And the Senate Finance Committee similarly remarked (S. Rep. No. 275, 67th Cong., 1st Sess., p. 32):

> Section 1314 of the proposed bill authorizes the commissioner, with the approval of the Secretary, to provide in making a regulation or Treasury decision which reverses a prior regulation or Treasury decision (if it is not immediately occasioned by a decision of a court of competent jurisdiction) that the new regulation or Treasury decision may be applied without retroactive effect.

Thus, it was clear that under the 1921 Act, any change in the regulations was to operate retrospectively as well as prospectively, unless the Treasury determined to permit the change to operate prospectively only. But where the change in regulations was occasioned by judicial decision the

Treasury was to have no discretion: such change was to affect all tax years, both before and after the change.

The next revenue act, the Revenue Act of 1924, c. 234, 43 Stat. 253, made no change in these provisions which were embodied in Section 1008 (a) of that Act. Thereafter, the same provisions were carried over as Section 1108 (a) of the Revenue Act of 1926, without any alteration. However, Section 605 of the Revenue Act of 1928, c. 852, 45 Stat. 791, amended Section 1108 (a) of the 1926 Act as follows:

> SEC. 605. RETROACTIVE REGULATIONS.
>
> Section 1108 (a) of the Revenue Act of 1926 is amended to read as follows:
>
> "SEC. 1108. (a) In case a regulation or Treasury decision relating to the internal-revenue laws is amended by a subsequent regulation or Treasury decision, made by the Secretary or by the Commissioner with the approval of the Secretary, such subsequent regulation or Treasury decision may, with the approval of the Secretary, be applied without retroactive effect."

The purpose of the amendment was to increase further the discretion given to the Treasury. It was intended to permit the Treasury to determine whether a change in regulations should operate prospectively only, even where the change was induced by judicial decision. This was made abundantly clear by the Senate Finance Committee

which stated (S. Rep. No. 960, 70th Cong., 1st Sess., p. 40):[6]

> Section 1108 (a) of the revenue act of 1926 provides that where a regulation or Treasury decision is reversed by a subsequent regulation or Treasury decision, the subsequent decision may be applied without retroactive effect if the reversal is not immediately occasioned or required by a court decision. The policy of this provision is highly desirable, and in view of the fact that the Bureau of Internal Revenue is now comparatively free from the congestion of cases from the war years, it is believed that this policy may now be extended to cases where the new regulation or Treasury decision is occasioned or required by a court decision. Fundamentally there is no difference in the

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[6] In accepting the Senate amendment, the Conference Committee declared (H. Rep. No. 1882, 70th Cong., 1st Sess., p. 22):

"Section 1108 (a) of the revenue act of 1926 permits the commissioner to apply a new regulation or Treasury decision without retroactive effect when the new regulation or Treasury decision is not immediately occasioned by a court decision.

"This desirable policy has been extended by the Senate amendment so as to include all regulations and Treasury decisions whether or not occasioned by a court decision. It is hoped that this provision will prevent the constant reopening of cases on account of changes in regulations or Treasury decisions, and it is believed that sound administration properly places upon the Government the responsibility and burden of interpreting the law and of prescribing regulations upon which the taxpayers may rely; and the House recedes."

> two cases which can justify the restrictions in section 1108 (a) of the 1926 Act. Accordingly, these restrictions have been removed in section 605 of the bill. * * *

The final change wrought in these provisions appeared in Section 506 of the Revenue Act of 1934, which amended Section 1108 (a) of the 1926 Act to read:

> "(a) The Secretary, or the Commissioner with the approval of the Secretary, may prescribe *the extent, if any,* to which any ruling, regulation, or Treasury Decision, relating to the internal revenue laws, shall be applied without retroactive effect." [Italics supplied.]

The discretion vested in the Treasury was now complete. The Treasury could determine not only whether changes in regulations were to be retrospective in all cases, but it was given the further power of declaring the exact extent of retroactivity. Thus, under the new provisions, the Treasury might provide for a change in regulations that would operate retroactively for any designated period. The committee reports leave no doubt whatever that this was the purpose of these provisions. The House Ways and Means Committee unambiguously explained the amended provisions as follows (H. Rep. No. 704, 73rd Cong., 2nd Sess., p. 38):

> This section amends section 1108 (a) of the Revenue Act of 1926, as amended, so as to permit the Secretary, or the Commis-

sioner with the approval of the Secretary, to prescribe the extent, if any, to which any regulation, Treasury Decision, or ruling relating to internal revenue taxes shall be applied without retroactive effect. The amendment extends the right granted by existing law to the Treasury Department to give regulations and Treasury Decisions amending prior regulations or Treasury Decisions prospective effect only, by allowing the Secretary, or the Commissioner with the approval of the Secretary, to prescribe the exact extent to which any regulation or Treasury Decision, whether or not it amends a prior regulation or Treasury Decision, will be applied without retroactive effect. The amendment furthermore permits internal revenue rulings as well as regulations or Treasury Decisions to be applied without retroactive effect. *Regulations, Treasury Decisions, and rulings which are merely interpretive of the statute, will normally have a universal application, but in some cases the application of regulations, Treasury Decisions, and rulings to past transactions which have been closed by taxpayers in reliance upon existing practice, will work such inequitable results that it is believed desirable to lodge in the Treasury Department the power to avoid these results by applying certain regulations, Treasury Decisions, and rulings with prospective effect only.* [Italics supplied.]

A similar statement was made by the Senate Finance Committee. S. Rep. 558, 73rd Cong., 2nd Sess., p. 48.

The history of these provisions plainly shows, we submit, that Congress intended the Treasury to have full and complete discretion to determine to what extent changes in regulations are to operate retroactively. Nowhere in the legislative history is there the slightest suggestion that the Treasury's discretion was to be limited, in the language of *Helvering* v. *Reynolds Tobacco Co.,* merely "to correct misinterpretations, inaccuracies, or omissions." 306 U. S. at 116. The broad sweep of the statutory provisions themselves and the clear and persistent statements appearing in the committee reports afford no support whatever for limitation imposed upon those provisions by the *Reynolds* decision. In the circumstances, we think it peculiarly appropriate to ask the Court to reconsider its decision in the *Reynolds* case.

Under the foregoing provisions of the revenue law, it is plain that the Commissioner had *statutory* authority to apply the 1936 Regulations to the transactions here in controversy. And we respectfully submit that the only question remaining is whether the exercise of that authority in the circumstances is so arbitrary as to be violative of due process.

Since the officers of the Government who administer the tax laws are probably in a better position to know whether any particular regulation would

be oppressive if given retroactive application, the Congress wisely left it to the Commissioner and the Secretary in each instance to determine whether and to what extent a particular regulation would operate without retroactive effect. And to the extent that equities may be thought to arise merely from the passing of long periods of time, Congress apparently felt that taxpayers would be sufficiently protected by the statute of limitations.

That the amendment in the instant case was neither arbitrary nor oppressive is clear. Unlike the regulation in the *Reynolds* case which had announced the *nontaxability* of a certain transaction, the regulation here simply deals with the *measure* of tax upon a concededly taxable transaction. When petitioner made the gifts in question she knew that they would be subject to tax, and since the tax is upon the amount of money or property which passes from the donor, there is nothing arbitrary or capricious about subsequent provisions which make it clear that the tax is to be measured by the amount which the taxpayer had donatively expended. Cf. *Paramino Co.* v. *Marshall,* 309 U. S. 370, 378; *Graham & Foster* v. *Goodcell,* 282 U. S. 409, 429; *Hecht* v. *Malley,* 265 U. S. 144, 164; *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 302.

A similar objection under the Fifth Amendment was made to a statutory change in the estate-tax rates in *Milliken* v. *United States,* 283 U. S. 15. There a decedent who had made a gift in contem-

plation of death while the Revenue Act of 1916 was in effect, died after the enactment of the Revenue Act of 1918 which imposed an estate tax at much higher rates than under the 1916 Act. In sustaining the tax at the higher rates, the Court said (p. 23):

> Not only was the decedent left in no uncertainty that the gift he was then making was subject to the provisions of the existing statute, but in view of its well understood purpose he should be regarded as taking his chances of any increase in the tax burden which might result from carrying out the established policy of taxation under which substitutes for testamentary gifts were classed and taxed with them.

Cf. *Cohan* v. *Commissioner*, 39 F. (2d) 540, 545 (C. C. A. 2d); *United States* v. *Hudson*, 299 U. S. 498.

Accordingly, if the 1936 Regulations had been enacted by Congress there could be no doubt as to their validity. However, Congress has specifically given the Commissioner the power to promulgate such retroactive regulations. He has exercised that power in this case, and in so doing he not only acted within his statutory authorization but acted within the constitutional requirements of due process. To the extent that the *Reynolds* decision denies that power to the Commissioner it is in square conflict with the unambiguous terms of a valid statute. That decision transfers to the courts the discretion

which Congress lodged with the Commissioner. It is erroneous and should be overruled.

CONCLUSION

The 1936 Regulations are applicable and valid. The decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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JANUARY 1941.

APPENDIX

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 501. IMPOSITION OF TAX.

(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift. * * * (U. S. C., Title 26, Sec. 550).

* * * * *

SEC. 506. GIFTS MADE IN PROPERTY.

If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift (U. S. C., Title 26, Sec. 555).

* * * * *

SEC. 530. RULES AND REGULATIONS.

The Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this title.

Treasury Regulations 79, issued under the Revenue Act of 1932, promulgated February 26, 1936:

ART. 2. *Transfers reached.*—The statute imposes a tax whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible. * * * In the following examples of transactions resulting in taxable gifts, it will be understood that the transactions occurred after the date of the enactment of the statute (June 6, 1932), and were not for an adequate

and full consideration in money or money's worth:

* * * * *

(5) If the insured assigns a life insurance policy, or designates a beneficiary in such a policy, but does not retain what amounts to a power of revocation (as, for example, the right to surrender or cancel the policy, the right to obtain a loan against the policy or its surrender value, or a right to change the beneficiary or assignee, if by the exercise of such latter right the proceeds of the policy might be made payable to the insured, his estate, or otherwise for his benefit), such assignment or designation constitutes a gift, even though the right of the assignee or beneficiary to receive the proceeds is conditioned upon his surviving the insured. For the valuation of policies of life insurance, see subdivision (9) of article 19.

(6) If there is an irrevocable gift of a policy of life insurance and the insured thereafter pays premiums thereon, each premium payment is a gift in the amount thereof.

* * * * *

ART. 19. *Valuation of property.*—(1) *General.*—The statute provides that if the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift. The value of the property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell. * * *

* * * * *

(9) *Life insurance and annuity contracts.*—The value of a life insurance contract or of a contract for the payment of an annuity issued by a company regularly en-

gaged in the selling of contracts of that character is established through the sale of the particular contract by the company, or through the sale by the company of comparable contracts. As valuation through sale of comparable contracts is not readily ascertainable when the gift is of a contract which has been in force for some time and on which further premium payments are to be made, the value may be approximated, unless because of the unusual nature of the contract such approximation is not reasonably close to the full value, by adding to the interpolated terminal reserve at the date of the gift the proportionate part of the gross premium last paid before the date of the gift which covers the period extending beyond that date.

The example given below, so far as relating to life insurance contracts, are of gifts of such contracts on which there are no accrued dividends or outstanding indebtedness.

Example: A donor purchases from a life insurance company for the benefit of another a life insurance contract or a contract for the payment of an annuity; the value of the gift is the cost of the contract.

*　　*　　*　　*　　*

Example: A donor owning a life insurance policy on which no further payments are to be made to the company (e. g., a single premium policy or paid-up policy) makes a gift of the contract. The value of the gift is the amount which the company would charge for a single premium contract of the same specified amount on the life of a person of the age of the insured.

Example: A gift is made four months after the last premium due date of an ordi-

nary life insurance policy issued nine years and four months prior to the gift thereof by the insured, who was 35 years of age at date of issue. The gross annual premium is $2,811. The computation follows:

Terminal reserve at end of tenth year	$14, 601. 00	
Terminal reserve at end of ninth year	12, 965. 00	
Increase	1, 636. 00	
One-third of such increase (the gift having been made four months following the last preceding premium due date), is		$545. 33
Terminal reserve at end of ninth year		12, 965. 00
Interpolated terminal reserve at date of gift		13, 510. 33
Two-thirds of gross premium ($2,811)		1, 874. 00
Value of the gift		15, 384. 33

* * * * *

Treasury Regulations 79, October 30, 1933, edition:

ART. 2. *Transfers reached.*—The statute imposes a tax whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible. * * * In the following examples of transactions resulting in taxable gifts, it will be understood that the transactions occurred after the date of the enactment of the statute (June 6, 1932), and were not for an adequate and full consideration in money or money's worth:

* * * * *

(5) The irrevocable assignment of a life insurance policy, or the naming of the beneficiary of a policy without retaining any of the legal incidents of ownership therein, constitutes a gift in the amount of the net cash surrender value, if any, plus the prepaid insurance adjusted to the date of the gift.

(6) Where premiums on a life insurance policy are paid by an insured who has none

of the legal incidents of ownership in the policy, and the beneficiary is other than the insured's estate, each premium payment is a gift in the amount thereof.

* * * * *

ART. 19. *Valuation of property.*—(1) *General.*—The statute provides that if the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift. The value of property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell. Where the property is sold within a reasonable period after the date of the gift, and it is shown that the selling price reflects the fair market value thereof as of the date of the gift, the selling price will be accepted as the amount of the gift. All relevant facts and elements of value should be considered in every case.

* * * * *

(7) *Annuities, life, remainder, and reversionary interests.*—Where the donor purchases from a life insurance company or other company issuing annuity contracts, an annuity for the donee, the value of the gift is the cost to the donor, * * *.

G. C. M. 13147, XIII-1 Cumulative Bulletin 358 (1934):

Regulations 79, Article 2: Transfers reached.

XIII-22-6820

(Also Section 506 and Article 17.)

G. C. M. 13147

Computation of the value of an irrevocably assigned life insurance policy for gift tax purposes.

A ruling is requested as to the proper method of computing the value of a life in-

surance policy, for gift tax purposes, which was irrevocably assigned on April 1, 1933, without consideration.

Section 501 of the Revenue Act of 1932 imposes a tax upon all transfers of property by any individual after June 6, 1932, to the extent that they are donative in character and exceed the authorized deductions.

Section 506 of that Act provides that—

"If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift."

Article 2 of Regulations 79 reads in part as follows:

"The statute imposes a tax whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible. * * *

"(5) The irrevocable assignment of a life insurance policy, or the naming of the beneficiary of a policy without retaining any of the legal incidents of ownership therein, constitutes a gift in the amount of the net cash surrender value, if any, plus the prepaid insurance adjusted to the date of the gift."

A life insurance policy in the amount of $100,000 taken out on January 1, 1928, was irrevocably assigned by the insured on April 1, 1933, without consideration. The annual premium of $2,849 was payable in advance on January 1. The policy provides in part as follows:

"The cash surrender value shall be the reserve on the face of the policy at the end of the insurance year or, event of default, at the date of default (omitting fractions of a dollar per thousand of insurance) and the reserve on any outstanding paid-up ad-

ditions, under section 2, option (c), plus any dividends standing to the credit of the policy, under section 2, option (d), and less a surrender charge for the third to the ninth years, inclusive, of not more than 1½ per-cent of the face of the policy. Such reserve will be computed on the basis of the American Table of Mortality and interest at 3 percent, and the amount of paid-up insurance under (2) and the term of the continued insurance and amount of pure endowment under (3) will be computed on the same basis at the attained age of the insured on the date of default.

"The values in the table opposite are computed in accordance with the above provisions, assuming that premiums have been paid in full when due for the number of years stated, that there is no indebtedness to the company, no outstanding paid-up additions, no dividends standing to the credit of the policy and that no dividends have been applied on the accelerative endowment plan; the surrender charge, if any, has been deducted."

After the policy has been in force for a period of four years the cash surrender value for each $1,000 of the face amount is $46, and after the policy has been in force for a period of five years the cash surrender value for each $1,000 of the face amount is $63. All premiums were paid when due, no indebtedness was due the company by the holder prior to assignment, and there were no paid-up additions and no dividends standing to the credit of the policy.

It is to "the net cash surrender value, if any," that the addition of "the prepaid insurance adjusted to the date of the gift" (article 2, Regulations 79) is to be made.

The word "prepaid," meaning in advance or beforehand, obviously refers to a payment antedating the making of the gift. Fundamentally, life insurance, like other insurance, is simply a contract. By paying premiums the insured obtains the promise of the insurer to pay money on the former's death, or before that event. As such promise by the insurer is "insurance," and is bought by the premium payments, the two words, "prepaid insurance," manifestly mean a premium payment made before the gift to obtain the promise of the insurer. That promise may be to pay a sum in cash on surrender of the policy contract, or, if not surrendered, to pay the face of the policy on the insured's death. Whatever the terms of the promise, the obtaining or purchasing thereof is through premium payments.

The following examples illustrate the Bureau's interpretation of the meaning of the concluding clause of subdivision (5) of article 2, Regulations 79, reading—"plus the prepaid insurance adjusted to the date of the gift":

"1. In a case there the cash surrender value of the policy at the end of the insurance year 1932 was $4,600, and where such value was increased to $6,300 immediately upon the payment on January 1, 1933, of the $2,849 premium due for the insurance year 1933, the amount of the gift on April 1, 1933, the date on which the policy was irrevocably assigned, was $6,300, representing the cash surrender value of the policy, plus $861.75, representing the prepaid insurance adjusted to the date of the gift. (Premium paid January 1, 1933, $2,849 less $1,700, the additional cash surrender value created by the

payment of such premium, and less $287.25, representing the earned premium from January 1 to April 1, 1933; $2,849 – $1,700 = $1,149 – $287.25 = $861.75.)

"2. In a case where the premium was duly paid for the insurance year 1933, where the cash surrender value of the policy at the end of the insurance year 1932 was $4,600, where the cash surrender value was increased to $6,300 at the end of the insurance year 1933, and where the cash surrender value of $6,300 was adjustable to the date of surrender of the policy, the amount of the gift on April 1, 1933, the date on which the policy was irrevocably assigned, was $5,025 (representing the cash surrender value adjusted to April 1, 1933), plus the present worth of $1,275 (the balance added to the cash surrender value at the end of the insurance year 1933), plus $861.75, representing the unearned premium adjusted to the date of the gift and computed in the manner set forth in example 1.

"3. In a case where the $2,849 premium was duly paid for the insurance year 1933, where the cash surrender value of the policy at the end of the insurance year 1932 was $4,600, where that value was increased to $6,300 at the end of the insurance year 1933, and where the cash surrender value of $6,300 was not adjustable to the date of surrender of the policy, the value of the gift on April 1, 1933, the date on which the policy was irrevocably assigned, was $4,600 (representing the cash surrender value of the policy), plus the present worth of $1,700, the amount added to the cash surrender value at the end of the insurance year 1933, plus $861.75, representing the unearned premium adjusted to

the date of the gift and computed in the manner set forth in example 1."

In view of the foregoing, it is held that, where the insured makes a gift of the insurance to another, the insured having theretofore paid a premium in purchase of the insurer's promise, which promise covers a period not yet elapsed when the gift is made, the value of the gift includes (as illustrated in the foregoing examples) the net cash surrender value of the policy at the date of the gift and that proportionate part of the premium paid before the gift, which covers a period extending beyond the gift. When the premium payment purchases the right to an increased cash surrender value, which is not available until the end of the policy year, a discount is required in arriving at its present worth as of the date of the gift.

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